

NOT FOR PUBLICATION

NO. 24368

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JOHN EDDIE HORNER, Plaintiff-Appellant/Cross-Appellee, v.
JULIE-ANN MEHANA AIO HORNER, Defendant-Appellee/Cross-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(FC-DIVORCE NO. 99-3969)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

John Eddie Horner (Husband or Eddie) appeals, and Julie-Ann Mehana Aio Horner (Wife or Julie) cross-appeals, the April 11, 2001 divorce decree and the May 23, 2001 order regarding clarification, reconsideration and amendment thereof, entered in the family court of the first circuit, the Honorable Darryl Y.C. Choy, judge presiding. Wife also appeals the August 3, 2001 order of the family court that denied her motion for an advance of costs and attorneys' fees on appeal.

After an assiduous review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we resolve the parties' points of error as follows:

A. Husband's Appeal.

1. Husband contends the family court abused its discretion, Hawaii Revised Statutes (HRS) § 580-47(a) (Supp.

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2003); Gussin v. Gussin, 73 Haw. 470, 479, 836 P.2d 484, 489 (1992), when it declined to award him the date-of-marriage net market value (DOM NMV) of the Akalani Loop property as a Category 1 capital contribution credit, and instead divided equally as a Category 5 NMV, the \$35,000 found by the family court to be the net equity in the Akalani Loop property at the date of trial (DOT). We disagree. The family court's January 31, 2002 findings of fact (FsOF) and conclusions of law (CsOL), as amended by its March 20, 2002 order,

reflect that the family court considered the evidence presented and determined that [Husband's] testimony was not a reliable representation of the net equity of the propert[y] on the date of marriage. Accepting this implicit finding, and in light of the fact that no actual [appraisal was] presented to the family court,

the family court's refusal to characterize the Akalani Loop property as Category 1 property "cannot be said to be clearly erroneous." Booth v. Booth, 90 Hawai'i 413, 416, 978 P.2d 851, 854 (1999) (citations omitted). "Additionally, it is well settled that an appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Id. (brackets, citation and internal quotation marks omitted). Therefore, Wife's apparent agreement with Husband's DOM valuation of the property notwithstanding, "[b]ecause the assessment of the weight of [the] evidence properly lay within the sound discretion of the family court, the ICA lack[s] a basis for setting aside the family court's findings on appeal." Id. Accordingly, if

error there was in the family court's apparent alternate conclusion that the Akalani Loop property "became joint property for which Eddie is not entitled to Category 1 credit[,] "see Gussin, 73 Haw. at 486-89, 836 P.2d at 492-94, that alleged error was "either harmless or indicates that the trial court reached the right result for the wrong reasons." State v. Propios, 76 Hawai'i 474, 486, 879 P.2d 1057, 1069 (1994) (citation omitted). In sum, the family court did not abuse its discretion in refusing to treat the Akalani Loop property as Husband's Category 1 property.

2. Husband also contends the family court erred in determining the fair market value and the NMV of the Akalani Loop property as at the DOT. However, we "will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Booth, 90 Hawai'i at 416, 978 P.2d at 854 (citation and internal quotation marks omitted). There was "substantial evidence" in the record to support the family court's FsOF, and we are not "left with a definite and firm conviction that a mistake has been made" in this respect. Hence, the family court's FsOF were not "clearly erroneous[.]" In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (citation and internal quotation marks omitted).

3. Husband avers that the family court erred in finding (FOF 42) that the "Carpenter's Trust Retirement benefits awarded to Eddie had a during-marriage appreciation \$6,700 value

at DOT." We agree with Husband on this point. The only evidence before the family court regarding this asset were fund documents and Husband's asset and debt statements, indicating a DOM NMV of \$4,721.73 and a DOT NMV of \$8,750.25. Because FOF 42 lacked substantial evidence in support and was therefore clearly erroneous, In re Doe, 95 Hawai'i at 190, 20 P.3d at 623, we vacate it and remand.

4. In numerous points of error sprinkled throughout his opening brief, Husband argues that the family court erred in its determinations regarding the value, categorization and/or existence of various other assets of the parties. We disagree. First, and again, we "will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Booth, 90 Hawai'i at 416, 978 P.2d at 854 (citation and internal quotation marks omitted). Also, we do not countenance a party taking one position regarding the existence and value of an asset below, then arguing against it on appeal -- as where Husband claimed certain items of personal property of certain values below but argues a lack of trial evidence thereof on appeal. Cf. Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some internal quotation marks omitted)). Finally, with the exception of an immaterial

typographical error, there was "substantial evidence" in the record to support each of the subject FsOF, and we are not "left with a definite and firm conviction that a mistake has been made" in these respects. Hence, the subject FsOF were not "clearly erroneous[.]" In re Doe, 95 Hawai'i at 190, 20 P.3d at 623 (citation and internal quotation marks omitted). See also Kuroda v. Kuroda, 87 Hawai'i 419, 429, 958 P.2d 541, 551 (App. 1998) ("party who alleges that an item of property of one or both of the parties is not partnership property has the burden of proof"); Booth, 90 Hawai'i at 416, 978 P.2d at 854 ("Where a party does not offer [reliable] evidence of an asset's value, the party cannot complain as to the disposition of that asset by the court." (Citation and internal quotation marks omitted.)); Gussin, 73 Haw. at 478, 836 P.2d at 489 (HRS § 580-47 confers "wide discretion" upon the family court in property division); Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986) ("the source of the asset is but one of the circumstances of the case, as is a spouse's positive or negative effect on the accumulation or preservation of the separate property" (citations and internal quotation marks omitted)).

5. Finally, Husband argues that the family court erred in ordering him to pay one-half of Wife's divorce-related attorneys' fees and costs. We conclude the family court did not abuse its discretion in doing so, HRS § 580-47(a)(4); Markham v. Markham, 80 Hawai'i 274, 287-88, 909 P.2d 602, 615-16 (App.

1996), because we cannot say that the family court's order was not "fair and reasonable." Markham, 80 Hawai'i at 288, 909 P.2d at 616 (citation and internal quotation marks omitted).

B. Wife's Appeal.

1. Wife commences her argument on cross-appeal with a section entitled, "Why Julie Filed the Appeal."

Eddie's position at trial was that Julie should get no alimony and no real property. Eddie received half of what he wanted when Judge Choy did not award Julie any alimony. On appeal Eddie is trying to take away the property that Judge Choy awarded to Julie. Julie has cross-appealed Judge Choy's decision to not award her alimony because Eddie has appealed the property division portion of Judge Choy's decision. The expense to appeal Judge Choy's decision not to award the amount of alimony Julie needed to complete her training as a nurse was not cost-effective given the limited resources available to Julie post-divorce. However, if Eddie's appeal results in Julie receiving less property, then alimony must be revisited. Thus, Julie felt compelled to cross-appeal.

Wife's Opening Brief at 6 (citations to the record omitted). In light of the relatively minor adjustment in property division entailed by our disposition of Husband's appeal, supra, it would appear Wife's cross-appeal has lost much of its exigency. We conclude, at any rate, that the family court did not abuse its discretion in declining to award Wife alimony. HRS § 580-47(a); Cassiday v. Cassiday, 6 Haw. App. 207, 215-16, 716 P.2d 1145, 1151 (1985), aff'd in part, rev'd in part, 68 Haw. 383, 716 P.2d 1133 (1986).

2. Wife appeals the family court's refusal of an advance of costs and attorney's fees on appeal. We decide that the family court did not abuse its discretion in doing so. HRS

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§ 580-47(b) (Supp. 2003);¹ Markham, 80 Hawai'i at 287-88, 909 P.2d at 615-16; Carson v. Carson, 50 Haw. 182, 188, 436 P.2d 7, 11 (1967).

Therefore,

IT IS HEREBY ORDERED:

1. The family court's January 31, 2002 FsOF and CsOL, as amended by its March 20, 2002 order, are affirmed, except that FsOF 42 and 70 (the equalization payment provision) are vacated. We remand for amendment thereof and any other necessary conforming amendments, consistent with this order.

2. The family court's April 11, 2001 divorce decree is affirmed, except that paragraph 13 (the equalization payment provision) is vacated. We remand for amendment thereof and any other necessary conforming amendments, consistent with this order.

3. The family court's May 23, 2001 order regarding clarification, reconsideration and amendment of the divorce decree is affirmed.

¹ The court shall at all times, including during the pendency of any appeal, have the power to grant any and all orders that may be necessary to protect and provide for the support and maintenance of the parties and any children of the parties to secure justice, to compel either party to advance reasonable amounts for the expenses of the appeal including attorney's fees to be incurred by the other party, and to amend and revise such orders from time to time.

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4. The family court's August 3, 2001 order denying Wife's motion of an advance of costs and attorneys' fees on appeal is affirmed.

DATED: Honolulu, Hawai'i, March 25, 2004.

On the briefs:

Robert M. Harris, for
plaintiff-appellant/cross-appellee.

John W. Schmidtke, Jr., for
defendant-appellee/cross-appellant.

Acting Chief Judge

Associate Judge

Associate Judge